

The Supreme Court TransUnion Case: Part 2—What It Means for Efforts to Defeat Class Certification?

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On June 25, 2021, the Supreme Court issued a significant opinion on standing in the context of consumer class actions in *TransUnion LLC v. Ramirez*. The Supreme Court affirmed that certain members of a class action lacked standing—and therefore could not be members of the class. Notwithstanding a jury’s determination that the defendant had violated the Fair Credit Reporting Act (the “FCRA”) as to the entire class, the Supreme Court held that certain class members had not demonstrated “concrete harm”: the defendant maintained files for each of these individuals that contained misstatements, but those misstatements were not all disseminated to third parties. As we discuss below, *TransUnion* may create new opportunities to exclude putative class members and bolster arguments that a court should not certify a class action in the first instance because mini-trials would be required to determine which alleged class members have standing.

The Opinion. *TransUnion* arose from a lawsuit filed by Sergio Ramirez, who tried to purchase a vehicle but was unable to qualify for a loan because the defendant’s OFAC Name Screen Alert identified Ramirez as a “potential match” for someone designated as a national security threat.¹ *TransUnion* matched consumers against a watchlist maintained by the Treasury Department’s Office of Foreign Asset Control (“OFAC”) using only their first and last names.

Ramirez filed suit alleging three claims against *TransUnion* based on violations of the FCRA: (1) failure to “follow reasonable procedures to assure maximum possible accuracy” of his credit report, (2) failure to provide his complete credit report upon request, and (3) failure to provide a summary of his rights “with each written disclosure.” Ramirez sought to certify “a class of all people in the United States to whom *TransUnion* sent a mailing during the period from January 1, 2011, to July 26, 2011, that was similar in form to the second mailing that Ramirez received.”² The parties stipulated that the class contained 8,185 members and that only 1,853 members had their reports disseminated to potential creditors. After a trial, the jury returned a verdict for the class.

¹ *TransUnion v. Ramirez*, No. 20-297, slip op. at 4 (June 25, 2021).

² *Id.* at 5.

TransUnion appealed on the basis that the class lacked standing and that Ramirez’s claims were not typical of the class. The Ninth Circuit affirmed. The Supreme Court reversed, holding that the 6,332 class members whose credit reports were inaccurate, but not disseminated to third parties, did not suffer a “concrete injury” and therefore lacked standing—without which they could not be valid members of the class.³

The Court underscored the burden placed on a plaintiff to show standing in every action, including a class action. The Court began by stating that “[e]very class member must have article III standing in order to recover individual damages”—although, in a footnote, the court declined to decide “whether every class member must demonstrate standing *before* a court certifies a class.”⁴ Furthermore, “standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages).”⁵

In this matter, the disputed question was whether plaintiff could meet his burden to show that class members had met the standing element of suffering concrete harm. The Court explained that harms can be concrete if they are physical or monetary, or if the injury bears “a close relationship to the harms traditionally recognized as providing a basis for the lawsuits in American courts,” *e.g.*, reputational harm.⁶ The fact that Congress created a cause of action does not necessarily mean that a violation of the statute in question caused the plaintiff to suffer concrete harm. The Supreme Court identified “an importance difference . . . between (i) a plaintiff’s statutory cause of action to sue a defendant over the defendant’s violation of federal law and (ii) a plaintiff’s suffering concrete harm because of the defendant’s violation of federal law.” “Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.”⁷

The Court then applied its analysis of concrete harm to the claims brought by Ramirez. The Court held that individuals who were the subject of an OFAC alert and whose reports were disseminated to third-party businesses had standing. The injury suffered by such individuals bore a close relationship to the reputational harm associated with defamation.

The Court, however, held that individuals in the class whose files contained misleading OFAC alerts—but were not disseminated to third parties—lacked standing. The Court explained that “[t]he mere presence of an inaccuracy in an internal credit file, if it is not

³ *Id.* at 18.

⁴ *Id.* at 15.

⁵ *Id.* at 15–16.

⁶ *Id.* at 9.

⁷ *Id.* at 11.

disclosed to a third party, causes no concrete harm.”⁸ The Court analogized the situation to one where a defamatory letter was written and not disseminated.

The Court rejected the argument presented by plaintiffs that the risk of future harm was sufficient to confer standing. The Court explained that while injunctive relief may be appropriate to avert future harm, a risk of future harm does not qualify as a concrete harm for the purpose of seeking damages “unless the exposure to the risk of future harm itself causes a *separate* concrete harm.”⁹ The plaintiffs here did not demonstrate they had suffered from some other injury apart from the mere risk of potential future disclosure—and indeed plaintiffs did not present evidence that the class members even knew that there were OFAC alerts in their files. Moreover, “[t]he plaintiffs had the burden to prove at trial that their reports were actually sent to third-party businesses” and their attempt to imply that some reports likely were provided to businesses was insufficient to confer standing.¹⁰ The Court noted that plaintiffs could have obtained such evidence by contacting the absent class members, but did not do so.

Class Action Defense in Light of *TransUnion*. Defense counsel in class actions should carefully consider whether and how *TransUnion* can be incorporated into their defense strategy. The central teaching of *TransUnion* is that class action plaintiffs bear the burden of coming forward with evidence that all class members have standing—and that standing exists for each claim and form of relief. Defense counsel may be able to contest standing where, among other things, (i) there is no evidence that the defendant violated the law in its alleged interaction with certain putative class members or (ii) class members seek damages for a harm that may occur in the future or is otherwise highly speculative. Moreover, even if plaintiffs meet their burden with respect to some class members, defense counsel can seek to narrow the class and exclude members for whom plaintiffs cannot establish standing.

Defense counsel may also be able to argue that a class action cannot be certified at all because fact-intensive individualized inquiries are required to determine whether class members have standing.¹¹ Although the Supreme Court declined to resolve the issue, it cited to an Eleventh Circuit decision holding that a class seeking damages could not be certified without considering whether individualized standing determinations predominated. *TransUnion* should be helpful in making this argument in other circuits. In light of the Supreme Court’s emphasis on absent class members having standing, it would be illogical for a district court to certify a class, only to find itself in a situation

⁸ *Id.* at 19.

⁹ *Id.* at 20.

¹⁰ *Id.* at 24.

¹¹ This argument can be made in addition to other arguments about why a class cannot be certified, including that fact-intensive issues are required to determine class membership and/or liability, or that the named plaintiff is not typical of the alleged class.

where a class action became unmanageable because individualized determinations were needed to determine who had standing in the first place.

For defense counsel, the argument that individualized inquiries are required to determine standing may be a powerful defense to class certification. In a case similar to *TransUnion*, for example, defense counsel might be able to present evidence in support of the argument that the only way to determine whether a report with misleading information was provided to a third party is to conduct plaintiff-by-plaintiff mini-trials to determine what, if anything, happened to the report. Courts have repeatedly recognized that class actions cannot be certified under such circumstances.

Finally, defense counsel should take note of Justice Thomas' observation in dissent that *TransUnion* may prove to be a pyrrhic victory because plaintiffs may bring similar class actions in state court and now have new arguments against removal to federal court. The trend of plaintiffs' counsel preferring state court is not new. It is the consequence of a variety of decisions by the federal judiciary that have held class actions to higher standards in recent years.

Regardless, defense counsel will still have the opportunity to remove state court class actions to federal court. Whether through the Class Action Fairness Act or when diversity requirements are met, defendants can remove and dismiss claims brought by class members who lack federal standing, at least in the first instance.

And even when plaintiffs' counsel successfully brings a class action that cannot be removed, that is not necessarily a victory for the plaintiff. To start, for any defendant with nationwide operations, a class action brought in state court will be much smaller than a nationwide class brought in federal court. Further, defense counsel may have options available to them above and beyond the class action defenses that are available in federal court. In particular, the defendant may be able to argue—relying on the Supreme Court's opinion in *Bristol Myers Squibb* (discussed [here](#))—that the state lacks jurisdiction over claims brought on behalf of out-of-state plaintiffs. A defendant may also be able to limit the scope of a class or argue that a class cannot be certified when federal claims rely on a state statute because those claims would entail applying a state's law outside its borders. That is a particular issue with respect to communications involving cellular telephones, as it may be impossible to determine, without detailed inquiry, whether an alleged class member was in or outside a state at the time of the alleged conduct.

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